

Training School at Vineland and Communications Workers of America, AFL-CIO, Petitioner.
Case 4-RC-19575

December 15, 2000

DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On March 8, 1999, the Regional Director for Region 4 issued a Decision and Direction of Election (relevant portions are attached as an appendix) finding that the Employer's group home managers (GHMs) are not supervisors within the meaning of Section 2(11) of the Act.

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, the Employer filed a timely request for review of the Regional Director's decision. By Order dated June 23, 1999, the Board granted the Employer's request for review. The election was conducted as scheduled on April 7, 1999, and the ballots were impounded.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

We have carefully considered the entire record in this proceeding, and affirm the Regional Director's determination that the GHMs are not statutory supervisors.

The facts are set forth in detail in the appendix. Briefly, the Employer provides residential care and educational programs to developmentally disabled individuals (clients) in 44 group home settings in southern New Jersey. The Employer has a director, six assistant directors, and two night supervisors for these programs (one night supervisor position is presently vacant). A GHM and several counselors and technicians (direct care workers) are assigned to each of the 44 facilities. Four to sixteen clients reside at each home. The Petitioner seeks to represent a unit consisting of the 44 GHMs.¹

The Employer asserts that its GHMs are supervisors within the meaning of Section 2(11) of the Act. It claims that they assign, direct, effectively recommend hiring, effectively recommend discipline, and evaluate the employer's direct care workers. The Employer also asserts that the GHMs redress employee grievances. We agree with the Regional Director that the Employer has not met its burden of establishing that GHMs possess any of the claimed statutory supervisory authority.²

¹ The direct care workers assigned to 33 of the homes are represented by the Amalgamated Local 2327, United Automobile Workers of America, AFL-CIO. The Petitioner represents in a separate unit the direct care workers in the other 11 homes.

² In particular, we find that the Employer has not shown that GHMs possess statutory supervisory authority to adjust employee grievances or effectively recommend such action. To the extent that GHMs have some involvement in the grievance resolution procedure, the evidence

The Employer asserts that the GHMs must be statutory supervisors, since otherwise there would be no other supervisors at the group homes. Nothing, however, in the statutory definition of "supervisor" suggests that service as the highest ranking employee on site requires finding that such an employee must be a statutory supervisor. See *VIP Health Services v. NLRB*, 164 F.3d 644, 649-650 (D.C. Cir. 1999) (if an employee "do[es] not possess Section 2(11) supervisory authority, then the absence of anyone else with such authority does not then automatically confer it"); *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997); *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983); *Washington Post Co.*, 254 NLRB 168, 204 (1981); cf. *Beverly Enterprises v. NLRB*, 148 F.3d 1042, 1048 (8th Cir. 1998) (where a statutory supervisor is available by telephone or pager, "the highest ranking on-site employee will not invariably be considered a supervisor"); *Northeast Utilities Service Corp. v. NLRB*, 35 F.3d 621, 625 (1st Cir. 1994), cert. denied 514 U.S. 1015 (1995); *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273, 1279 (5th Cir. 1986); *Highland Superstores, Inc. v. NLRB*, 927 F.2d 918 (6th Cir. 1991) (highest ranking employee on the premises does not ipso facto make them supervisors, citing *NLRB v. Res-Care*, supra); see also *Empress Casino Joliet Corp. v. NLRB*, 204 F.3d 719 (7th Cir. 2000) ("we grant that the idea of a completely unsupervised vessel is, although implausible, not completely preposterous" (citations omitted)). Thus, evidence must still be presented that supports a finding that an individual possesses one or more of the indicia set forth in Section 2(11). As the Regional Director found, the Employer has not presented sufficient evidence to establish that GHMs possess any of the indicia set forth in Section 2(11).³

does not specify with any clarity what role they play. Indeed, there is no evidence that a GHM independently adjusted or used his or her independent judgment to effectively recommend the adjustment of a grievance pursued by an employee through the Employer's grievance procedure.

³ We recognize that the courts are split on the issue and that some courts are critical of the Board's failure to find individuals to be supervisors where there would otherwise be no statutory supervisor present at the facility. See, e.g., *Glenmark Associates, Inc. v. NLRB*, 147 F.3d 333, 341-342 (4th Cir. 1998) ("We cannot fathom the Board's position that for more than two-thirds of the week at a nursing home providing twenty-four hour care, where patient conditions can change on a moment's notice, there is no one present at the facility exercising independent judgment"); *Kentucky River Community Care v. NLRB*, 193 F.3d 444, 453-454 (6th Cir. 1999), cert. granted 121 S.Ct. 27 (2000) (serving regularly as the highest ranking employee in the building is supervisory in nature). However, just as the Board is constrained by the statute to find supervisory status where any one of the statutorily prescribed indicia of supervisory status is present, we believe that we are constrained by the statute *not* to find an employee to be a supervisor

The Employer also relies particularly on decisions of the Third Circuit Court of Appeals denying enforcement of Board Orders in cases concerning the statutory supervisory status of employees. In *Passavant Retirement & Health Center v. NLRB*, 149 F.3d 243 (3d Cir. 1998), denying enf. 323 NLRB 598 (1997), one of those cases, the court specifically stated that it was “not creating a per se rule” concerning the supervisory status of employees. Indeed, each case must be decided on its facts. Here, the Regional Director carefully considered the duties and responsibilities of the group home managers and found that the evidence does not establish that GHMs possess statutory supervisory authority.

We are not unmindful that the Third Circuit’s interpretation differs from that of the Board’s over the meaning of the term “independent judgment” in Section 2(11)—particularly as to the application of that term to the authority to assign, direct, and discipline employees, and resolve employee grievances. Briefly, the Board finds judgment the use of which requires that it be exercised beyond that involved in regular or customary activities and which is not controlled or significantly constrained by outside sources to be independent judgment under Section 2(11). See, e.g., *Weyerhaeuser Timber Co.*, 85 NLRB 1170 (1949); *The Door*, 297 NLRB 601 (1990). The Board’s interpretation of the meaning and application of the term “independent judgment” in Section 2(11) has been generally upheld by the First, Seventh, Eighth, Ninth, Eleventh, and District of Columbia Circuits. *NLRB v. Provident Nursing Home*, 187 F.3d 133 (1st Cir. 1999); *Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259 (11th Cir. 1999); *NLRB v. Grandcare, Inc.*, 170 F.3d 662 (7th Cir. 1999); *Lynwood Health Care Center, Minnesota v. NLRB*, 148 F.3d 1042 (8th Cir. 1998); *Grandview Health Care Center v. NLRB*, 129 F.3d 1269 (D.C. Cir. 1997); *Providence Alaska Medical Center v. NLRB*, supra. Besides the Third Circuit, the Board’s interpretation

unless it has been established that at least one of those indicia is present.

The Employer also asserts that if GHMs are not statutory supervisors, there would be only one assistant director to provide daily supervision for every 55 employees in the Community Living Department. The ratio of supervisors to employees is not one of the indicia of supervisory authority listed in Sec. 2(11). Without evidence that GHMs possess any one of the indicia of statutory supervisory authority, secondary indicia are not dispositive. See *Chrome Deposit Corp.*, 323 NLRB 961 (1997). Compare: *NLRB v. Prime Energy LTD Partnership*, 224 F.3d 206, 209 (3d Cir. 2000) (“we do not consider the ratio of supervisors to employees when determining the supervisory status of a position”); *Empress Casino Joliet Corp. v. NLRB*, supra at 722 (ratio a consideration when employer cannot manage the business “without any help from other employees who owe their undivided loyalty to the company”); *Highland Superstores*, supra (low supervisor to employee ratio would be suspect; clearly out of balance).

has not been upheld in the Second, Fourth, and Sixth Circuits. *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260 (2d Cir. 2000); *Kentucky River Community Care v. NLRB*, supra; *Glenmark v. NLRB*, supra.

The Supreme Court has recently granted certiorari to resolve the conflict in the circuits over the meaning of the term “independent judgment” in Section 2(11) as it is applied to the authority of employees to direct and discipline employees. *NLRB v. Kentucky River Community Care*, 121 S.Ct. 27 (2000). Unless the Supreme Court decides otherwise, we adhere to our interpretation of the term “independent judgment.” We believe that that interpretation furthers the purpose of Section 2(11): It gives effect to Congress’ intent to preserve the protections of the Act for employees who have only “minor supervisory duties” while excluding from coverage those who exercise “genuine management prerogatives.” S. Rep. No. 105, 80th Cong., 1st Sess. Pt. 1, at 4 (1947). Further, it comports with Congress’ intent to incorporate the definition of supervisor that the Board used in administering the Wagner Act, which excluded from supervisory status employees who provided limited oversight over other employees based on employer-specified standards, as is the case here.

Accordingly, we do not believe the responsibilities of the GHM evidence the requisite independent judgment necessary to find statutory supervisory authority. See, e.g., *Graphics Typography, Inc.*, 217 NLRB 1047 (1975), enf. mem. 547 F.2d 1162 (3d Cir. 1976); *Children’s Farm Home*, 324 NLRB 61 (1997); cf. *Fred Finch Youth Center*, 243 NLRB 77 (1979).

ORDER

The Regional Director’s decision is affirmed, and the case is remanded to the Regional Director for further appropriate action.

APPENDIX

DECISION AND DIRECTION OF ELECTION

The Employer operates residential, educational, and treatment centers for developmentally disabled adults and children in southern New Jersey, including a facility located at 1667 East Landis Avenue, Vineland, New Jersey (the Main Campus). Communications Workers of America, AFL-CIO (the CWA), the Petitioner in Case 4-RC-19575, seeks to represent a unit of approximately 44 full-time and regular part-time group home managers and senior group home managers³ employed at all of the Employer’s 44 southern New Jersey group homes.⁴ The Employer takes the position that group home managers are supervisors under Section 2(11) of the Act. Amalgamated Lo-

³ At the hearing, the Employer’s executive director testified that the classification of “senior group home manager” is no longer in existence.

⁴ The UAW did not seek to intervene in Case 4-RC-19575.

cal 2327, United Automobile Workers of America, AFL-CIO (the UAW), the Petitioner in Case 4-UC-351, took the position at the hearing that group home managers are not supervisors, but in its brief stated that it takes no position concerning the supervisory status of the group home managers.

The Employer and the UAW are parties to a collective-bargaining agreement that is effective from August 22, 1996, though June 30, 1999. The agreement covers approximately 300 full-time and part-time nonprofessional employees, including licensed practical nurses, orderlies/aides, instructors without degrees, residential counselors, group home technicians, groundskeepers, plumbers, carpenters, general maintenance persons, electricians, mechanics and teachers instructors employed at the Main Campus and at 33 group homes in southern New Jersey.

The Employer and the CWA are parties to a collective-bargaining agreement covering approximately 125 full-time and regular part-time technicians, instructors, and independent living trainers, including their substitutes, who work at 11 group homes and at the Main Campus.⁵

Neither the CWA nor the UAW agreements specifically exclude group home managers, but both agreements exclude supervisors.

Prior to 1990, the Employer received funding from the New Jersey State Division of Developmental Disabilities (DDD) under two programs, the Community Services program and the Purchase of Care program. The Community Services program funded several group homes and a day program. Employees in this program were represented by the CWA. The Purchase of Care program funded services at the Main Campus and in residential units located at the Main Campus. The UAW represented these employees. In 1994, the Employer moved its residential operations from the Main Campus and opened 30 group homes for some 200 relocated clients. Most of the UAW-represented employees accompanied the relocated clients to the newly opened group homes, while a smaller number remained on the Main Campus.

Division Director Sharon Omrod oversees the 44 group homes within the Employer's Community Living program. Six Assistant Directors reporting to Omrod are responsible for seven to nine group homes each. There are approximately 44 group home managers who report to their respective assistant directors. Each assistant director supervises both UAW- and CWA-represented group homes.

The Employer's 44 group homes are located in four counties in southern New Jersey. Each group home houses from 4 to 16 clients, with an average of 6 clients per home. The group homes are staffed 24 hours per day, 7 days per week by 250 direct care workers including counselors and technicians.⁶ The direct care workers earn from \$7.25 to \$11 per hour. Their average wage rate is about \$8.50 to \$8.60 per hour. Each group

home is under the direction of a group home manager. The operations of the group homes are fairly uniform. The staff assists the developmentally disabled clients with basic adaptive living skills such as eating, dressing and hygiene and participates in an individual habilitation plan for each client. The staff also transports the clients to and from their day programs and doctors' appointments, performs housekeeping duties, goes shopping for the clients, attends meetings, and take the clients on outings. They follow specific written shift responsibilities established for each group home. Staffing varies at each group home. Most often there are two group home counselors or technicians on the first shift, two on the second shift and one on the third shift.

Group home managers work from 40 to 60 hours a week. They earn from \$10 to more than \$20 per hour, with an average of approximately \$12 per hour. Group home managers work flexible hours, but typically cover the first of three shifts, starting from 7 to 9 a.m. and quitting between 4 and 6 p.m., Sunday through Thursday or Tuesday through Saturday. They visit other shifts as they deem necessary. Assistant directors visit the group homes for an hour or so about once or twice per month.

Group home managers provide coverage for each other necessitated by vacations, sick and disability leave, termination and resignation. They assemble at the Main Campus for weekly unit meetings, monthly department meetings and other meetings attended by the executive director and human resources department personnel. Group home managers have transferred from UAW-represented group homes to CWA-represented group homes. Group home managers call each other regularly for insights on clients and staff.

Group home managers are responsible for ensuring compliance with requirements established by the State's Division of Developmental Disabilities concerning staffing and client-care. They are required to know the Employer's policies, procedures, and goals and communicate any policy changes to direct care workers at in-service training and monthly staff meetings. The Employer provides group home managers with training on topics such as "Supervisory Review of Abuse, Neglect or Unfair Treatment," "Attendance Policy/Payroll Review" and sexual harassment issues. Group home managers may also convene voluntary staff meetings at their homes to discuss issues, problems or goals. At these meetings, group home managers may direct the staff to take specific actions to solve minor problems in the home such as increasing their sanitation duties. Group home managers may ask a new staff member to stay at the home beyond his or her shift to discuss problems or questions the employee has or may wish to raise. In addition to these duties, group home managers may also perform direct care duties including waking clients, assisting them with their hygiene, feeding them breakfast, giving their medication, cleaning, and providing transportation for them.

The Employer experiences substantial turnover among its direct care workers and has found it difficult to recruit workers in some group homes located away from the Main Campus. As a result, the Employer holds job fairs at various locations in the four counties in which it has group homes in order to maintain a ready pool of applicants. Group home managers may partici-

⁵ In Case 4-RC-19595, the undersigned Regional Director on February 4, 1999 issued a Decision and Direction of Election in a unit of job coaches employed by the Employer at its Main Campus. The CWA filed the petition in Case 4-RC-19595 and the UAW did not intervene.

⁶ The employees in both the UAW- and CWA-represented units employed in the group homes are collectively called direct care workers.

pate in these job fairs and interview applicants with representatives from the human resources department. When the human resources department concludes that an additional direct care worker is needed, or when openings occur, the human resources department gathers applications and interviews applicants.⁷ The human resources department, rather than the group home managers, initiate this process; checks the applicants' references and their motor vehicle records. The human resources department may contact a group home manager and ask the manager to arrange a second interview in the group home. When the human resources department refers the applicant to a group home manager for a second interview, the group home manager completes a checklist of questions based on observations of the applicant in the group home setting. The group home manager thereafter enters a notation at the bottom of the application form recommending for or against employment and sends the application back to the human resources department. There is no other communication between the group home manager and the human resources department in connection with an application. Not all workers obtain a second interview. If the human resources department concludes that an applicant is not a desirable candidate, the process ends. On some occasions, the human resources department places the direct care worker in the home without input from a group home manager. The human resources department may also hire a direct care worker contrary to a group home manager's recommendation not to hire. In this event, the human resources department will not place the worker in that manager's group home.

Group home managers provide orientation and on-the-job training for new employees. Assistant directors dictate the job tasks to be performed on each shift and direct care workers divide the tasks among themselves. Direct care workers generally know how to perform these tasks. The group home manager is responsible for assuring that the work is performed properly, that clients are well cared for and that employees work their required hours. Group home managers sign off on direct care workers' time sheets and check the shift logs and staff paperwork to assure that the home is being run properly and the clients are being cared for correctly. The group home manager will counsel employees regarding performance shortcomings, require them to undergo additional or refresher training and advise them that discipline will follow if the deficiencies continue.

Group home managers annually receive a master schedule showing the number of hours, the regular shift and specific days off for each employee in each group home. The group home manager adjusts the schedule to staff uncovered shifts when employees call out sick, are on vacation, or are otherwise unavailable. The group home manager follows an established procedure regarding the order in which employees are contacted for uncovered shifts. If no employee can cover the shift, the group home manager will. The record shows that group home managers have filled in for direct care workers and performed their duties from 5 to 30 hours per week in addition to performing their group home manager duties. Executive Direc-

tor Jane Detweiler testified that group home managers can require direct care workers to come in or work a double shift. Group home managers testified that they routinely ask, rather than require, direct care workers to cover shifts. Employees calling in sick or to report that they will be late must contact their group home manager who can excuse the lateness or absence if he or she deems the reason to be an emergency. The group home manager will note this on the employee's time record, and so noted, the lateness or absence is not counted as an occurrence under the Employer's attendance policy. That policy requires the imposition of discipline upon the eighth occurrence. At the end of the pay period, the group home manager tallies all the hours worked by each employee, transfers them to a time card and delivers the timecards to the assistant director for review who then transmits them to the payroll department. Group home managers are responsible for client and petty cash funds for the home, and are the only individuals with access to the home's safe. Group home managers prepare a monthly client activity calendar and a monthly group home assessment.

Group home managers are authorized to grant time off to employees who have accumulated leave. These employees must complete the appropriate forms and submit them to their group home managers for approval which is routinely granted if coverage can be arranged. The group home manager can deny the request for those periods for which coverage cannot be found. Group home managers are also authorized to approve up to 32 hours of overtime in a pay period but must justify the approval to their assistant directors after the fact.

Group home managers are required to be on call around the clock and available to the direct care workers in their homes but they have the discretion to decide whether they need to come to the group home to address a problem. For this on-call responsibility, the group home managers receive one additional vacation day per month. When the group home manager is unavailable, another group home manager or a higher level supervisor must assume on-call responsibility for the group home.

Group home managers prepare evaluations of the group home staff. In addition to providing numerical ratings on the performance areas such as communication, reliability/dependability, quality of work and job performance, the group home manager provides written comments. The group home manager discusses the evaluation with the employee, signs and dates it, asks the employee to sign and date it, and forwards it to the community living department director for signature. On at least one occasion, at the suggestion of an assistant director, the group home manager changed an evaluation. A copy of the evaluation is maintained in the human resources department and in the employee's personnel file. The evaluations do not directly affect employees' wages. Executive Director Detweiler testified that they can have an impact on the Employer's decisions regarding discharge, promotions, work improvement plans, transfers and discipline. The record contains no evidence of an evaluation having such an impact on any employee's terms or conditions of employment.

Group home managers report instances of misconduct and poor performance by the direct care workers to their assistant Director or to the human resources department. Group home

⁷ Until April 1998, group home managers conducted the initial interview.

managers also deliver copies of disciplinary documents to the employees in their homes. In some cases, group home managers have recommended that a particular discipline be imposed. There are numerous instances of discipline in the record. In some instances group home managers recommended discipline that was imposed and, in other instances, the discipline was ultimately not imposed. In some instances, assistant directors have ignored group home managers' reports of misconduct altogether. The record also contains numerous instances in which discipline against a group home worker was initiated and recommended by assistant directors or the human resources department. The Employer's policy requires that any decision to suspend or discharge an employee be approved by the Human Resources Department. By memorandum dated April 3, 1998, Jim Mallardi, the Employer's director of human resources, notified "all management personnel," including group home managers, that all disciplinary action notices must be "communicated to" either Mallardi or the assistant director of human resources prior to their implementation.

The collective-bargaining agreements to which both the CWA and the UAW are parties, provide that all grievances (the CWA agreements) or grievances concerning discipline (the UAW agreement) may be filed in writing with the human resources department after informal discussions with the employee's immediate supervisor have proven unsuccessful or have not been pursued. Group home managers have become involved in resolving grievances both before and after they are filed with the human resources department, particularly those concerning the group home manager's arrangements for providing staff coverage. The record shows one instance in which a grievance was abandoned by the Union after a meeting with the group home manager. In another instance, a group home manager acknowledged to the Union and her assistant director that she had made a mistake in not scheduling an employee. With the assistance of the group home manager's assistant director, the employee was paid. There were also several written grievances indicating resolution at the group home manager level, but there is no record evidence clarifying the role played by higher level officials.

Unlike the direct care workers, group home managers are required to have a minimum of 2 years postsecondary education or 2 years of working with people with developmental disabilities, at least 1 year of which should have been in a supervisory capacity. The job description of the group home managers provide that they supervise, train, communicate with staff, providing leadership to ensure that client needs are met effectively; effectively delegate, plan, organize and manage the area supervised; and, supervise and schedule staff to meet coverage standards.

A finding of supervisory status is warranted only where the individuals in question possess one or more of the indicia set forth in Section 2(11) of the Act. *Providence Alaska Medical Center*, 320 NLRB 717, 725 (1996), enfd. 121 F.3d 548, 156 LRRM 2001 (9th Cir. 1997); *The Door*, 297 NLRB 601 (1990); *Phelps Community Medical Center*, 295 NLRB 486, 489 (1989). The statutory criteria are read in the disjunctive, and possession of any one of the indicia listed is sufficient to make an individual a supervisor. *Providence Alaska Medical Center*,

supra, 320 NLRB at 725; *Juniper Industries*, 311 NLRB 109, 110 (1993). The statutory definition specifically indicates that it applies only to individuals who exercise independent judgment in the performance of supervisory functions and who act in the interest of the employer. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 574; *Clark Machine Corp.*, 308 NLRB 555 (1992). The Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestions, and between the appearance of supervision and supervision in fact. *Providence Alaska Medical Center*, supra, 320 NLRB at 725. The exercise of some supervisory authority in a merely routine, clerical or perfunctory manner does not confer unital supervisory status on an employee. *Id.*; *Juniper Industries*, supra, 311 NLRB at 110. The authority effectively to recommend "generally means that the recommended action is taken with *no* independent investigation by superiors, not simply that the recommendation is ultimately followed." *ITT Lighting Fixtures*, 265 NLRB 1480, 1481 (1982) (emphasis in original). The sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. *Robert Greenspan, DDS*, 318 NLRB 70 (1995), enfd. mem. 101 F.3d 107, (2d Cir. 1996), cert. denied 117 S.Ct. 68, (1996), citing *NLRB v. Lindsay Newspapers*, 315 F.2d 709, 712 (5th Cir. 1963); *Gaines Electric*, 309 NLRB 1077, 1078 (1992); *Ohio River Co.*, 303 NLRB 696, 714 (1991), enfd. 961 F.2d 1578 (6th Cir. 1992). Job descriptions or other documents suggesting the presence of supervisory authority are not given controlling weight. The Board insists on evidence supporting a finding of actual as opposed to mere paper authority. *East Village Nursing Center v. NLRB*, 160 LRRM 2342, 2345-2346 (D.C. Cir. 1999); *Store Employees Local 347 v. NLRB*, 422 F.2d 685 (D.C. Cir. 1969); *NLRB v. Security Guard Services*, 384 F.2d 143 (5th Cir. 1969), enfg. 154 NLRB 8 (1965); *North Miami Convalescent Home*, 224 NLRB 1271, 1272 (1976).

The burden of establishing supervisory status is on the party asserting that such status exists. *Northcrest Nursing Home*, 313 NLRB 491, 496 fn. 26 (1993); see *Bennett Industries*, 313 NLRB 1363 (1994). The Board has cautioned that the supervisory exemption should not be construed too broadly because the inevitable consequence of such a construction would be to remove individuals from the protections of the Act. *Providence Alaska Medical Center*, supra, 320 NLRB at 725; *Northcrest Nursing Home*, supra, 313 NLRB at 491. Where the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. *Phelps Community Medical Center*, supra, 295 NLRB at 490. The legislative history of Section 2(11) makes it clear that Congress intended to distinguish between employees performing minor supervisory duties and supervisors vested with genuine management prerogatives, and did not intend to remove individuals in the former category from the protections of the Act. S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947), reprinted in 1 Leg. Hist. 407, 410 (LMRA 1947). The legislative history also shows that Congress considered true supervisors to be different from lead employees or straw bosses who merely

provide routine direction to other employees as a result of superior training or experience. *Id.*, reprinted at 1 Leg. Hist. at 410 (LMRA 1947). *Providence Alaska Medical Center*, supra, 320 NLRB at 725; *Ten Broeck Commons*, 320 NLRB 806, 809 (1996). An individual will not be found to be a supervisor unless he or she has a “kinship to management.” *Adco Electric*, 307 NLRB 1113 fn. 3 (1992), *enfd.* 6 F.3d 1110, 144 LRRM 2763 (5th Cir. 1993); *NLRB v. Security Guard Services*, supra, 66 LRRM at 2250. Further, “supervisory direction” of other employees must be distinguished from direction incidental to an individual’s technical training and expertise, and technical employees will not be found to be supervisors merely because they direct and monitor support personnel in the performance of specific job functions related to the discharge of their duties. *Robert Greenspan, DDS*, supra, 318 NLRB at 76; *New York University*, 221 NLRB 1148, 1156 (1975).

Based on the foregoing, I find that the Employer has not carried its burden of establishing that group home managers are supervisors within the meaning of Section 2(11) of the Act. There is no record evidence to establish that group home managers transfer, lay off, recall, promote, or reward direct care workers or any other employees. The evidence concerning the authority of the group home managers to recommend effectively the hiring of direct care staff is inconclusive. As discussed above, the human resources department initiates the hiring process and may place workers in group homes without ever contacting group home managers for input. Although group home managers are asked, in some instances to conduct a second interview of an applicant and to make a recommendation as to whether the applicant should be hired, the ultimate decision rests with the human resources department, which may or may not adopt the group home manager’s recommendation. The only concession to the group home manager who recommends that an applicant not be hired is that the applicant will be placed in another group home. In these circumstances, I find that the record does not show that the group home managers have the authority claimed by the Employer. *Ryder Truck Rental*, 326 NLRB 1386 (1998); *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 392 (1989), *enfd.* 933 F.2d 626, (8th Cir. 1991); *Bowne of Houston*, 280 NLRB 1222 (1986); *Oregon State Employees Assn.*, 242 NLRB 976 (1979).

A similar conclusion is warranted with respect to the role of group home managers in the issuance of discipline. All discipline must be cleared with the human resources department and the department must approve all recommendations to suspend or discharge employees. Group home managers clearly report instances of misconduct and poor performance and have, on some occasions, specifically recommended that discipline be imposed. However, in many instances the Employer has either not adopted or ignored group home managers’ recommendations altogether. In these circumstances, it cannot be said the group home managers’ recommendations are effective or that the record conclusively shows that they possess the indicia of supervisory authority. Accordingly, I find that the Employer has not met its burden of establishing that group home managers have authority to impose or effectively recommend discipline in the exercise of independent judgment within the meaning of Section 2(11). *Ten Broeck Commons*, supra, 320 NLRB

at 809; *Northcrest Nursing Home*, supra, 313 NLRB at 497 (1993); *Hydro Conduit Corp.*, 254 NLRB 433 (1981); *Florida Steel Corp.*, 220 NLRB 225, 227 (1975), *enfd.* in relevant part 544 F.2d 896 (5th Cir. 1977).

Although group home managers perform scheduling functions and direct employees, the evidence falls short of demonstrating that they exercise independent judgment in these aspects of their duties. The Employer provides group home managers with a master schedule setting forth the hours and shifts on which employees are to work. A group home manager may adjust the schedule based on employee requests and as needed for coverage with the consent of affected employees. See *Providence Alaska Medical Center*, supra, 320 NLRB at 725; *Ohio Masonic Home*, 295 NLRB 390, 395 (1989). As to the direct care workers’ daily tasks, the record shows that assistant directors dictate the jobs each shift is to perform and the employees divide the work among themselves. Direct care workers know how to perform these tasks and group home managers thus do not need to provide day-to-day direction. When Employer policies change, group home managers relay that information to the staff in their homes, but group home managers do not set or participate in setting that policy. The record discloses only very minor instances in which group home managers have directed the staff to take certain actions, such as regularly cleaning bathrooms to solve a sanitary problem in the home. This is routine, rather than responsible, direction within the meaning of Section 2(11) of the Act. *Providence Alaska Medical Center*, supra, 320 NLRB at 725; *Ten Broeck Commons*, supra, 320 NLRB at 809. Further, while group home managers are required to be on call 24 hours per day, they usually are not physically present at their group homes on the second and third shifts to oversee direct care workers on those shifts. Accordingly, the evidence demonstrates that group home managers provide no more than a conduit for direction provided by Assistant Directors and by changes in Employer policy and that they do not responsibly direct group home staff. *Providence Alaska Medical Center*, supra, 320 NLRB at 725; *Hexacomb Corp.*, 313 NLRB 983, 984 (1994).

The Employer also failed to meet its burden of establishing that group home managers exercise 2(11) supervisory authority in preparing performance evaluations for the direct care workers in their homes. The evaluations are not tied to employee wage increases or promotions, nor do they directly affect any employee term or condition of employment. Although Executive Director Detweiller testified that evaluations can have an impact on the Employer’s decisions regarding discharge, promotions, work improvement plans, transfers and discipline, the Employer presented no evidence of an employee evaluation having any specific positive or negative impact on any employee’s terms or conditions or employment. In the absence of specific evidence demonstrating such an impact, the Employer’s unsubstantiated assertions are insufficient to establish supervisory authority based on this aspect of group home managers’ duties. *Ahrens Aircraft*, 259 NLRB 839, 843 (1981), *enfd.* 703 F.2d 23 (1st Cir. 1983); *Beth Israel Medical Center*, 229 NLRB 295, 295 (1977).

The record shows that group home managers have been involved in resolving employee complaints about scheduling

issues, obtaining staff coverage and other matters within their purview. These complaints have been resolved both before and after a grievance was filed. The Board has held that authority to resolve these sorts of minor disputes is insufficient to establish supervisory status. *Riverchase Health Care Center*, 304 NLRB 861, 865 (1991). Accordingly, I find that no primary indicia of supervisory status have been established for group home managers. That they are paid more than direct care staff, are salaried and earn an extra vacation day for on-call responsibilities will not render them supervisors where no primary indicia of supervisory status exists. *First Western Building Services*, 309 NLRB 591, 603 (1992).

Based on the above, I find that group home managers are not supervisors within the meaning of Section 2(11) of the Act.⁸

⁸ See also *Green Acres Country Care Center*, 327 NLRB 257 (1998). Contra *Resident Home for the Mentally Retarded*, 239 NLRB 3 (1978) (housemothers who responsibly directed the staff of their group homes, granting them time off, controlling and adjusting their workloads and recommending discipline were supervisors); *Mon Valley United Health Services*, 238 NLRB 916, 923–925 (1978) (resident managers scheduled and assigned tasks to staff, wrote employee evaluations, made recommendations regarding the hiring of staff and the program director who supervised the resident managers did not directly supervise the staff of the group home).